In the District Court of the United States for the Northern District of California

Civil Action No. 23619–C

EL DORADO OIL WORKS, A CORPORATION, AND EL DORADO TERMINAL COMPANY, A CORPORATION, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLANTS

MOTION OF THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION TO AFFIRM DECREE OF DISTRICT COURT

Appellees United States and Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree, dated April 9, 1945, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing plaintiffs' complaint seeking to have set aside a certain action of the Interstate Commerce Commission. The action was taken by the Commission in *Allowances for Privately Owned Tank Cars*, 258 I. C. C. 371, which proceeding was instituted, in response to

the Supreme Court's decision in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, to determine the lawfulness of certain practices with reference to the rental of tank cars. The appeal was allowed on June 1, 1945, and the appeal papers were served on June 7, 1945.

The plaintiff El Dorado Terminal Company, is a wholly owned subsidiary of the plaintiff El Dorado Oil Works, hereinafter called the shipper, which is a corporation engaged in processing coconut oil from copra in plants at Berkeley and Oakland, California, and shipping the product in tank cars in interstate commerce. The General American Transportation Corporation, hereinafter called the Car Company, is a "private car line" rather than a common carrier and is the owner of numerous railroad cars, including tank cars, which it rents or leases to various shippers for the transportation of their products.

On September 28, 1933, the Car Company and the shipper entered into an agreement under which the former leased tank cars to the shipper. The agreement provided that the Car Company would collect from the railroads serving the shipper all mileage earned by the cars covered by the agreement and "each month credit to the rental or service account" of the shipper "all mileage earned by said cars while in the service" of the shipper "according to and subject to all rules of the tariffs of the railroads."

The tariffs of the railroads, though publishing a general provision for the payment of 1½ cents per

car per mile, both loaded and empty, for the use of tank cars of private ownership, contained rules governing the application of the provision which precluded payment of the mileage to the shipper under the circumstances of this case. The rules, in effect throughout the period here in question, provided *inter alia* that the mileage would be paid only to the "party" whose "reporting marks" appeared on the cars. It was specially provided in the agreement that all the cars covered thereby should bear the reporting marks of the Car Company. The mileage was not, therefore, under the terms of the tariff, payable to the shipper.

The terms of the agreement were observed for a period of approximately six months or until July 2, 1934, on which date the Interstate Commerce Commission rendered its decision in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323, 378–381, in which it held that the payment in whole or in part to shippers of mileage allowances by railroads, either directly or through car owners, in excess of the amount of rental such shippers pay for the use of the cars and other actual expenses in connection therewith, results in such shippers receiving transportation of their products at lower rates than those paid by shippers generally who use cars furnished by the carriers, and at less than the published rates.

After the issuance of this decision by the Commission, the Car Company refused to credit or pay over to the shipper any part of the mileage allowances in excess of the rental reserved in the lease. Until

that time the practice had been for the Car Company to collect the mileage, deduct the rental due, and pay the balance to the shipper. Thereafter, the Car Company collected the mileage allowances from the railroads, credited the shipper with the amount of the rental due, and retained the balance, refusing to pay it over to the shipper on the ground that if it did so it would be the instrumentality for the granting of unlawful concessions or rebates to the shipper. It appears that both before and after the change in the practice, the aggregate of the mileage earnings each month exceeded the rental due from the shipper. Throughout the entire period, therefore, the shipper paid nothing to the Car Company for the use of the cars.

In June 1935, the El Dorado Terminal Company, as assignee of the shipper, brought suit against the Car Company in the United States District Court for the Northern District of California to recover the unpaid excess mileage earnings which had accrued from the use of the leased cars up to May 31, 1935. The amount claimed was $18,532.78. Judgment for the Car Company was rendered by the District Court, but was reversed on appeal by the United States Circuit Court of Appeals for the Ninth Circuit, which held (104 F.2d 903) that the Terminal Company, the shipper's assignee, was entitled to the full amount claimed. The Supreme Court granted certiorari and subsequently held in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 432, 433, that the "question of the reasonableness and

legality of the practices of the parties was subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission," and that "when it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act." The judgment of the circuit court of appeals was reversed and the cause remanded to the district court to be there held "pending the conclusion of an appropriate administrative proceeding" by the Commission (308 U. S. at p. 433).

Pursuant to a petition subsequently filed with it by the shipper and its assignee, the El Dorado Terminal Company, the Commission instituted an investigation to determine (258 I. C. C. 371, 374):

> (1) whether the practices involved under the terms and operations of the lease contract are unlawful in violation of the Interstate Commerce Act;
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> (2) whether a reasonable charge or allowance may be paid, and, if so, the amount thereof as a maximum to be paid, by the carrier or carriers by railroads for the use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate commerce from Berkeley and Oakland, Calif., in the period January 1, 1934, to December 31, 1936; and
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> (3) what findings shall be made, or what rules, regulations, or practices shall be pre-

scribed, or what orders shall be entered, to remove any unlawfulness that may be found to exist.

Numerous common carriers by rail were made respondents in the proceeding. Following a hearing, in which the said respondents and the Car Company participated, the Commission issued its report. The Commission therein reviewed the action of the courts, considered in the light of the record made in the administrative proceeding the reasonableness and legality of the practices involved, and made findings in respect thereof, all in compliance with the direction of the Supreme Court in the *El Dorado Terminal Co.* case that the Commission's administrative judgment in the premises be obtained. At the conclusion of its report the Commission discontinued the proceeding after stating its conclusions as follows (258 I. C. C. at pp. 380–381):

> (1) That the rental paid or to be paid by El Dorado Oil Works [the shipper] to General American Tank Car Corporation [now the General American Transportation Corporation] under the terms of the lease agreement between those parties, dated September 28, 1933, was the only cost incurred by the former in furnishing the tank cars in which its shipments moved. A just and reasonable allowance as a maximum to have been paid by the respondents, rail carrier or carriers, to the Oil Works for the furnishing of such cars would have been an amount not to exceed such rental. Such an amount and allowance has been paid to the Oil Works through

credits made to the account of the Oil Works by the Tank Car Corporation.

(2) That an allowance to the Oil Works by the respondents, rail carrier or carriers, or by the Tank Car Corporation, under the agreement, in excess of said rental would be unjust and unreasonable, and would unduly prefer the Oil Works as a shipper of its commodities transported by it in the tank cars herein involved. The amount paid by the Tank Car Corporation to the Oil Works prior to July 1, 1934, under the terms of the agreement, to the extent it was in excess of the rentals due thereunder, was unjust and unreasonable, and unduly preferred the Oil Works as a shipper of its commodities.

(3) That the Oil Works is entitled to no allowance from the respondents, rail carrier or carriers, directly or through the Tank Car Corporation, for the special cleaning and preparation of the tank cars during the period of the agreement, January 1, 1934, to December 31, 1936.

In the suit thereafter brought under the Urgent Deficiencies Act by the shipper, it assumed and contended that the findings of the Commission, above described, coupled with its order discontinuing the proceeding, constituted an "order" within the meaning of that Act and it asked that the same be enjoined and set aside on the grounds, primarily, of lack of substantial evidence. The United States and the Commission defended on the merits but also insisted that the District Court, specially constituted as a court of three judges, was without jurisdiction.

In dismissing the complaint, the three-judge court sustained the latter contention, saying in part that

> By its finding and determination with respect to the practice here involved, the Interstate Commerce Commission made no decision which required any party to the proceeding before it to do or not to do any specific act. It followed the directions of the Supreme Court (*General American Tank Car Corp.* v. *El Dorado Terminal Co., supra* [308 U. S. 422]), and determined, under the Interstate Commerce Act, the lawfulness and reasonableness of the practice which had obtained between plaintiff and the tank car company. When this was done, its job was done. It was not required to make any order and made none and, having completed its work, stamped "finis" thereon and discontinued the proceeding. Hence there is no order, in the sense contemplated in the statute, requiring review by this court (*U. S.* v. *Griffin*, 303 U. S. 226, 233; *U. S.* v. *Ill. Cent. R. R. Co.*, 244 U. S. 82; *D. & H. Co.* v. *U. S.*, 266 U. S. 438; *U. S.* v. *L. A. Ry. Co.*, 273 U. S. 299).[1]

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[1] None of these four cases was overruled by *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. See 307 U. S. at pp. 130, 131, 135; see also *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 301; *Chicago & North Western Ry. Co.* v. *United States*, 320 U. S. 718. An excerpt from Mr. Justice Brandeis' opinion in the *Griffin* case is particularly relevant (303 U. S. at p. 233):

"In the opinion of Congress jurisdiction with the extraordinary features of the Urgent Deficiencies Act was justified by the character of the cases to which it applied—cases of public importance because of the widespread effect of the

> The procedure specified by the Supreme Court in *General American Tank Car Corp.* v. *El Dorado Terminal Co., supra*, has been followed. The administrative practice involved has been passed upon by the Interstate Commerce Commission. The parties may now proceed in the assumpsit action. Therein, in our opinion, the court may determine plaintiff's cause and, upon tender thereof, any competent defenses thereto.

Although the appeal presents a somewhat novel jurisdictional question, we submit that the opinion of the three-judge court was correct and that its decree should accordingly be affirmed without argument.

At the outset it should be emphasized that the action of the Commission in the investigation conducted by it was merely an ancillary step in a pending action of assumpsit brought by the shipper against the Car Company. The Supreme Court directed that the court in which that suit was pending should stay

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decisions thereof. In such cases Congress sought to guard against ill-considered action by a single judge and to avert the delays ordinarily incident to litigation. In construing the Act, this Court concluded that, despite the broad language used in the Commerce Court Act, Congress could not have intended to include in this special jurisdiction suits to set aside every kind of order issued by the Commission. For substantially every decision and every other kind of action by the Commission is expressed in, or is followed by, an order; and many of the orders are obviously not of such public importance and widespread effect as to justify, in cases affecting them, the extraordinary features of the Urgent Deficiencies Act."

its hand pending a determination by the Commission of the administrative question as to the amount, if any, of the allowance to be paid to the shipper as reasonable compensation for facilities supplied by it to the carrier. *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422. The Commission, in making its determination that the maximum permissible allowance would be the cost of renting the cars from the Car Company and that any allowance in excess thereof would constitute an unjust preference or rebate, was simply facilitating the conduct of the assumpsit action by performing a task referred to it in the course of the pending lawsuit.

In the *El Dorado Terminal Co.* case, the Supreme Court held that, the action being one in assumpsit on a written instrument, the lease agreement, the single-judge district court had jurisdiction of the subject matter and of the parties. While the money for which the shipper sued was not in the custody of the court, it was, nevertheless, money which the court, because of its jurisdiction over the agreement and the parties, could reach by its judgment or orders, whereas the Commission could not. The Commission could aid the court by determining the reasonable amount of allowance to which the shipper was entitled for the cars it had furnished the railroads in connection with its shipments.[2]

But it is clear that the Commission did not itself undertake to give effect to its determination and findings by making any order requiring the payment

[2] In the *El Dorado Terminal Co.* case, the Supreme Court explained that shippers requiring a specialized form of freight car for transportation of their products frequently rent the cars from car companies and then furnish them to the railroads. For so supplying the cars used in transport-

of money, or the performance of any other act either by the Car Company or by the carriers. Nothing purporting to give effect to that determination or those findings is contained in the Commission's order discontinuing the proceeding. That

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ing its products, a shipper is entitled to an allowance from the railroads out of the rates which it pays for the transportation. (See 308 U. S. at p. 429.)

But since any such allowance which would more than compensate the shipper for the expense to which he is put would result in his obtaining transportation at lower cost than shippers generally under the rates and thus amount to a rebate, the statute, while authorizing allowances to shippers furnishing "services or facilities" in connection with their shipments, specially provides that such allowances shall be no more than just and reasonable and that the Commission is to determine what would constitute a just and reasonable maximum allowance. Section 15(13) of Part I of the Interstate Commerce Act (49 U. S. C. 15(13)).

[3] The order reads as follows:

"*It appearing*, That by order dated July 24, 1940, the Commission, in response to a joint petition filed by El Dorado Oil Works and El Dorado Terminal Company, instituted and [an] investigation to determine the lawfulness of the practices under the terms of a contract dated September 28, 1933, between the El Dorado Oil Works and the General American Tank Car Corporation, and the reasonableness of the allowance to be paid by carriers by railroad for the use of tank cars furnished such carriers by the El Dorado Oil Works for the transportation of its products in interstate commerce during the period from January 1, 1934, to December 31, 1936;

"*It, further, appearing*, That a full investigation of the matters and things involved has been had, and that the parties have been fully heard, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

"*It is ordered*, That the proceeding be, and it is hereby, discontinued."

order, as its phraseology discloses, was merely a procedural step indicating that the docket was closed. Since all that was required of the Commission, in order to enable the court in the assumpsit action to exercise its jurisdiction and perform its functions was that the Commission determine the lawfulness of the practices and the just and reasonable allowance, if any, due the shipper, there is no occasion or reason for treating the findings and determinations as an order reviewable under the Urgent Deficiencies Act, rather than in the single-judge assumpsit action.

As shown by the decisions cited in the opinion of the three-judge court, the jurisdiction conferred on the district court by the Urgent Deficiencies Act [4] was designed for judicial review of only the Commission's orders of real substance. Although the jurisdiction conferred in terms covers suits to enjoin "any order of the Interstate Commerce Commission," such jurisdiction has not only been held not to extend to mere findings and determinations in a report of the Commission (*United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522; *Shannahan* v. *United States*, 303 U. S. 596) but also not to be applicable to all orders of the Commission, it having been pointed out (*United States* v. *Griffin*, 303 U. S. 226, 233) that practically every step taken by the Commission is preceded by the words "it is ordered." Thus in *United States* v.

[4] This jurisdiction was originally vested in the Commerce Court created by the Commerce Court Act of 1910. 36 Stat. 539. By the Urgent Deficiencies Act, the Commerce Court was abolished and its jurisdiction transferred to the several district courts of the United States. 38 Stat. 208, 219.

Illinois Cent. R. Co., 244 U. S. 82, 89, it was held that an order of the Commission assigning a case for hearing was not a reviewable order within the meaning of the Urgent Deficiencies Act and was nothing more than a mere notice of a hearing, the Court saying that

> The notice, therefore, had no characteristic of an order, affirmative or negative. It was a mere incident in the proceeding, the accident of the occasion—in effect, and, it may be contended, in form, but a continuance of the hearing. The fact that the continuance was to another day and place did not change its substance or give it the character described in *Procter & Gamble Co.* v. *United States* [225 U. S. 282], one which constrained the railroad company to obedience unless it was annulled or suspended by judicial decree.

While certain so-called "permissive orders" of the Commission are orders which are reviewable by three-judge courts, these are orders authorizing the carriers to do what the Interstate Commerce Act forbids them from doing without first obtaining the Commission's authority, such as the issuing of securities, the acquisition of new lines or the abandonment of existing lines. *Chicago Junction Case*, 264 U. S. 258, 263; *Venner* v. *Michigan Cent. R. Co.*, 271 U. S. 127, 131. It is evident that the order of the Commission in the instant case is not an order within this category any more than it is a mandatory order constraining carriers to obey commands of the Commission. Moreover, there are many other kinds of orders of the Commission which have been held not

to be reviewable under the special three-judge court jurisdiction, most of which are cited in the *Griffin* case (303 U. S. 226), which contains a comprehensive history of orders reviewable under the Urgent Deficiencies Act.

It is true that "negative orders" such as involved in *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, constitute the largest class of orders which in the past have been held not to be reviewable and that the doctrine that such orders are not reviewable has been overturned. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 142; *United States* v. *Maher*, 307 U. S. 148. However, the decision in the *Rochester Telephone Corp.* case applies only to "negative order" cases and it, in fact, expressly distinguishes (p. 130) such cases as *United States* v. *Illinois Cent. R. Co.*, 244 U. S. 82; *United States* v. *Los Angeles & S. C. R. Co.*, 273 U. S. 299; and *Shannahan* v. *United States*, 303 U. S. 596.

The order of discontinuance here involved simply indicates that the docket was closed and is an order of no more force and effect than the notice (termed an order) of hearing involved in *United States* v. *Illinois Cent. R. Co.*, 244 U. S. 82. Such order cannot, compatibly with the Commission's findings and the subject matter involved, be regarded as an order of dismissal or other "negative order" such as is now reviewable under the three-judge court rule. While, as held by the Supreme Court in the *El Dorado Terminal Co.* case, the shipper here was entitled to a reasonable allowance, the emphasis laid by the Court,

and by the Commission throughout, is on the Interstate Commerce Act's requirement (sec. 15 (13)) that such allowance shall not amount to excessive compensation to the shipper and thus constitute an illegal rebate. It is to the prevention of this that the Commission's findings are directed. If the Commission had intended to give effect thereto by an order of its own, directed either to the parties to the agreement, or to the carriers, such order would not have been one merely discontinuing the proceeding but would have been an order which, conformably to the issues and the findings, would have affirmatively forbidden the payments called for by the agreement, and required adjustment to the basis of the maximum amount of allowances to which the Commission found the shipper to be lawfully entitled.

It is evident that the Commission's findings were neither adapted to, nor intended for, carrying out by orders of its own, whether affirmative or negative. Although the Commission, by its findings, authoritatively fixed the reasonable amount of allowance payable to the shipper, it was without authority to enter affirmative orders directing the payment thereof either by the Car Company or by the carriers. The Car Company was not subject to the Commission's authority in any respect. See the *El Dorado Terminal Co.* case, 308 U. S. at p. 428. An order directing the carriers to pay the reasonable allowance found due was equally beyond the Commission's authority, for, even if the shipper's petition to the Commission were to be regarded as a

complaint asking for an award of reparation, the period of time within which such a complaint could be filed had long since lapsed.[5]

The shipper's petition to the Commission was not a complaint invoking the Commission's authority independently of the action in assumpsit in the district court. The shipper was a party to the lease agreement with the Car Company and, based on the agreement, it brought the action in assumpsit. The bringing by the shipper of a lawsuit to recover the mileage allowances to which it claimed to be entitled negates any possibility that its petition to the Commission was a complaint for recovery directly through the Commission upon its claim for the same mileage allowances. In any event, it is evident on the fact of the pleadings that the shipper's petition to the Commission (258 I. C. C. at p. 373) was not an independent complaint, but was filed responsive to the Supreme Court's holding and instructions in its decision on the appeal in the court action in as-

[5] Since, as held in the *El Dorado Terminal Co.* case, 308 U. S. at p. 431, it was the shipper, and not the Car Company, which furnished the cars to the railroads, the shipper might (except for its agreement with the Car Company) have complained to the Commission and sought an award of damages (sec. 8 of the Interstate Commerce Act; see also *Paragron Ref. Co.* v. *Alton & S. R. R.*, 118 I. C. C. 166, 168). The time within which such a complaint may be filed is limited to two years (sec. 16 (3) (b)), and such provision of Section 16 "is not a mere statute of limitations but is jurisdictional." *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, 642. Here the petition was not filed until 1940 although the cause of action accrued in 1934.

sumpsit brought by the shipper. See the *El Dorado Terminal Co.* case, 308 U. S. at p. 433.

As already stated, the Supreme Court, on certiorari in the assumpsit action in the *El Dorado Terminal Co.* case, held that the district court had jurisdiction of the lease agreement and of the parties. The Court's only qualification was that the district judge should have stayed his hand until the Commission had passed on the administrative questions involved. "There should not be a dismissal," the Court said, "but, as in *Mitchell Coal Co.* v. *Pennsylvania R. Co.*, *supra* [230 U. S. 247], the cause should be held pending the conclusion of an appropriate administrative proceeding. Thus any defenses the petitioner [Car Company] may have will be saved to it." (See the *El Dorado Terminal Co.* case, 308 U. S. at p. 433.) In the *Mitchell Coal* case, 230 U. S. 247, the Supreme Court expected the Commission only to make a determination or "ruling as to the reasonableness of the practice and the allowance involved" (*ibid.*, p. 267), and the Commission, in responding thereto, made such a ruling apparently without an accompanying order. *Mitchell Coal Co.* v. *Penna. R. R.*, 38 I. C. C. 43, 50. Thereafter, the case did not require further resort to the district court, but, if it had, the language at the end of the Supreme Court's decision (230 U. S. at p. 267) shows that the defendant would have had "the right to be heard on its plea of the statute of limitations as of the time the suit was filed and any other defense which it may have." Under this language it would

seem that the defendant, in such case, might have urged in defense the usual grounds for review of administrative determinations, *viz*, that the Commission's ruling was beyond its authority, without support in the evidence or otherwise arbitrary.

It was clearly recognized in *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 132, and *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407, 415, that a suit cannot be maintained under the Urgent Deficiencies Act unless the complaint states a cause of action in equity. It is elementary that the requisites of equity jurisdiction are lacking where there is an adequate legal remedy, or where the complainant is not faced with any immediate threat of interference with its rights. The Supreme Court's opinion in the *El Dorado Terminal Co.* case seems to imply that the same limited review of the Commission's action ordinarily obtainable before a three-judge court should be obtainable with respect to the instant "order" in the pending proceedings at law before a single judge, for it stated that "any defenses the petitioner [Car Company] may have will be saved to it." The Court said that there was remitted to the one-judge court "only the function of enforcing claims arising out of the failure to comply with the Commission's lawful orders," thereby seemingly recognizing that the one-judge court could determine whether the Commission's action was lawful. The Court said, too, that the one-judge proceeding should be held up "pending the conclusion of an appropriate administrative pro-

ceeding," apparently indicating that, once the Commission reported, only the one-judge court was to proceed. (See 308 U. S. at pp. 432-433.) As in *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, we believe that the present action of the Commission is reviewable only in the one-judge proceeding. Since the appellants would have an adequate remedy through a review of the Commission's action in the one-judge proceeding and since the Commission's action here cannot pose an immediate threat to appellants' rights until the one-judge court has passed upon its validity, the appellants have failed to satisfy the conventional requirements of equity jurisdiction.

In *United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522, the Supreme Court pointed out that the Commission had various duties and functions, which, while "calling" for findings and determinations, did not "call" for orders, and, although the Court did not specifically refer to situations of administrative rulings necessary to lawsuits, such situations fall clearly within the same principles. The decisions in *Shannahan* v. *United States*, 303 U. S. 596, and in *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, taken together, show both that the Commission's mere findings and determinations are not reviewable under the Urgent Deficiencies Act and that the proper place for their review is in the court where the questions determined are in issue. Accordingly, we maintain that the Commission's action here can be

reviewed only in the one-judge district court trying the assumpsit action.

For the foregoing reasons, it is respectfully submitted that the decree of the District Court should be affirmed.

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(Endorsed.) Filed June 22, 1945.

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